Supreme Court, U.S.
FILED

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No. 03-___

IN THE

Supreme Court of the United States

MARK WOOD,
Petitioner,

v.

CHARLIE GREEN, CLERK OF THE
CIRCUIT COURT FOR LEE COUNTY, FLORIDA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Are persons with disabilities who suffer episodic incapacity by flare-ups of their condition and are unable, due to the nature of their disability, to state the exact day that they will return to work, deprived of the benefit the Americans with Disabilities Act (ADA)?
2. Is the reasonableness of a requested accommodation for a leave of absence to recuperate from an episodic flare-up of cluster headaches to be denied as a question of law when the employee cannot state the exact day he or she will return to work or is the reasonableness of the accommodation a question for the jury under the individualized fact-by-fact attention required by *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 287 (1987)?
3. Could a reasonable jury, by evaluating all of the evidence, together with the logical inferences, in the light most favorable to Wood, have determined that Wood's request for a leave of absence to allow his cluster headaches to subside was a reasonable accommodation under the ADA?

List of Parties to the Proceeding and Corporation Disclosure

The caption of the case contains the names of all the parties, *i.e.*, Mark Wood, who is the Petitioner, and Charlie Green, Clerk of the Circuit Court for Lee County, Florida, who is the Respondent. There is no corporate party in this action and thus there is no parent or publicly held company owning 10% or more of any corporation stock.

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Citation of the Official Report of the Opinion Entered in the Case

The Eleventh Circuit Opinion upon which the Petition for Writ of Certiorari is sought was reported as *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003).

Statement of the Basis for Jurisdiction

(i) March 13, 2003 is the date of entry of the judgment of the Eleventh Circuit Court of Appeals sought to be reviewed.

(ii) May 9, 2003 is the date of the Order Denying the Petition for Rehearing and the Petition for Rehearing En Banc.

(iii) Reliance on Rule 12.5 is not applicable.

(iv) This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) which provides that cases in the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari after rendition of the judgment or decree of the Court of Appeals.

(v) Notifications required by Rule 29.4(b) or (c) are not applicable.

Statement of the Case

1. Statement of the Course of Proceedings and Disposition Below

Wood sued Green, Clerk of the Circuit Court for Lee County. 1-1-1.[1] The complaint alleged that the Clerk violated the American with Disabilities Act (ADA) when he terminated Wood's employment. 1-1-1-9. After answering the complaint, the Clerk moved for summary judgment, which was denied. 1-12-1; 1-27-1; 3-68-1-4. The matter proceeded to trial before a Senior Visiting Judge, Neil P. McCurn. 3-27-1. At the close of Wood's case, the Clerk moved for judgment as a matter of law (JMOL)on Wood's ADA claim. 3-92-1. The district court reserved ruling on the motion, and the Clerk renewed the motion at the close of all the evidence. 10-130-140. After the matter was submitted to the jury, the jury rendered a verdict for Wood on his ADA claim. 3-100-1-4. A judgment was entered in Wood's favor for back pay of $109,033 and reinstatement. 3-105-1-2.

The Clerk renewed his motion for JMOL. 4-111-1. Wood responded. 4-119-1. The district court denied the motion in a 17-page decision. *See* Appendix. Green appealed.

The Eleventh Circuit Court of Appeals, Judges Dubina, Hill and Cox presiding, entered an Opinion on March 13, 2003 reversing the district court's order denying Green's motion for JMOL and rendered judgment in favor of Green. *See* Appendix. Petitioner's petition for rehearing en banc

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[1]Although citations to the record may not be necessarily required in a Petition for Writ of Certiorari, they are provided in this Petition. "1-1-1" means Volume 1, docket document 1 and page 1 of docket document 1 of the Record at the Eleventh Circuit.

and for panel rehearing were denied on May 9, 2003. *See* Appendix.

This Petition for Writ of Certiorari timely followed within 90 days.

2. Basis for Federal Jurisdiction

This Petition for Writ of Certiorari seeks review of a judgment of the Eleventh Circuit Court of Appeals. The initial basis for Federal jurisdiction in the trial court was that the United States District Court had original jurisdiction under 28 U.S.C. §1331 because this action arose under the laws of the United States. In particular, this is an action pursuant to 42 U.S.C. §12101 *et seq.*, the Americans With Disabilities Act of 1990, as amended (ADA).

Jurisdiction to review the final judgment entered in the trial court rests in the Eleventh Circuit Court of Appeals under 28 U.S.C. §1291 which permits circuit courts of appeals to entertain appeals from final orders of district courts.

This Court has jurisdiction to review the decision of the Eleventh Circuit Court of Appeals under a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

3. Statement of the Facts Necessary to Argument of the Issues

Wood worked for the Lee County Clerk's office for 25½ years from August 1974 through January 5, 2000. 6-126-5-7; 7-127-78. Wood first began experiencing severe headaches in 1978. 6-126-11. In 1985, Wood's headaches would last a week, two weeks or longer. 6-126-13. In February, 1990, Wood was diagnosed in Houston, Texas as having cluster headaches. 6-126-38-39;7-127-138. In 1990, after Wood returned from Houston, the Clerk's office created a special position for Wood by removing his supervisory responsibilities and creating the position as

court's coordinator so that Wood's absences would not be a problem for the office. 6-126-45-46. The essential function of the new position consisted of review of new legislation and Rule changes that effected the court-side of the Clerk's office. 6-126-47. Fifty percent of Wood's time was spent on these functions. 7-127-189.

Wood's attendance greatly improved from 1991-1994. P/Exh.'s[2] 37, 40, 42 and 45; 6-126-67-73. Despite missing seven full weeks of work in 1995 and twelve weeks in 1996, Wood's September, 1996 appraisal stated, "During this past year Mark was able to achieve most of his goals." 6-126-82-83. Pursuant to the employee manual under which Wood worked, the Clerk had the discretion to grant leaves of absence without pay when Wood exhausted his vacation, sick and personal days and FMLA time. 7-127-23; P/Exh. 129. During all this time, the Clerk never required Wood to provide a date when he would return from his leaves of absence. 7-127-100. September, 1999, was the first time in 25 years that Wood did not receive a pay increase. 7-127-117.

On 12/6/99, Wood requested in writing a leave of absence to recover from an episode of cluster headaches. P/Exh. 85; 6-126-113. Shortly after the letter request, Wood called Green and Green told Wood not to worry about his job. 6-126-130. Green approved in writing a leave of absence without pay for Wood on 12/6/99, effective 12/3/99, with no termination date. 6-126-134-135;P/Exh. 66. Wood's doctor wrote a letter to Green dated December 6, 1999, which was not received by the Clerk's office until December 30, 1999 (due to secretarial turnover in the doctor's office) advising

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[2]"P/Exh." means Plaintiff's Exhibit in the trial court.

of his care and treatment of Wood. 7-127-147-148. Wood was terminated by the Clerk's office on 1-5-00. 7-127-140.

Wood testified that he could perform the essential functions of his job after he returned from his leaves of absence. 6-126-163. Wood believed that his work was left for him while he was on leave because he returned from absences to find a large amount of reading and work to be accomplished. *Id.* at 163. Wood had no mandatory day-to-day tasks, no secretary and no supervisory responsibilities. *Id.* at 165. Wood's request for a leave of absence was to allow him to recuperate from his cluster headaches and then return to work, as had been the routine in the past. *Id.* at 165. The maximum prior leaves were in the 1-2 month range (4-121-10), except for three months in 1990 when Wood went to Houston. 6-126-35. No witness offered any evidence that Wood's absences caused any undue hardship.

Green gave five reasons for Woods termination:

1. Excessive absences (the prime reason), 10-130-97;
2. No letter from a doctor (letter was received from a doctor);
3. Wood's failure to pay $400 for the insurance; (on the morning of the and prior to the termination, Wood's wife promised the money in two days), 9-129-67;
4. Wood's job had been absorbed by the rest of the department (no pleading offering this defense); and
5. There was no action on Wood's part that gave him comfort that Wood really wanted to work at the Clerk's office. 10-130-106

No evidence was offered of any change between December 6, when the leave of absence was granted, and December 31, 1999 (when Green made the decision to terminate Wood) to explain why what was considered a

reasonable accommodation when granted had suddenly become an undue hardship.

Argument and Authorities

The Eleventh Circuit Court of Appeals in this action has entered a decision which conflicts the First Circuit in *Garcia Ayala v. Lederle Parenterals,* 212 F.3d 638 (1st Cir. 2000), the Ninth Circuit in *Kimbro v. Atlantic Richfield Co.,* 889 F.2d 869 (9th Cir. 1989) and *Humphrey v. Memorial Hospital Association,* 239 F.3d 1129 (9th Cir. 2001), the Sixth Circuit in *Cehrs v. Northeast Ohio Alzheimer Research Center,* 155 F.3d 775 (6th Cir. 1998) and two Federal district court decisions dealing specifically with cluster headaches.

Alternatively, if the Eleventh Circuit decision in this action is *not* in direct conflict with the decisions of other U.S. Court of Appeals decisions on the same important matter, then the Eleventh Circuit has decided an important question of Federal law that has *not* been squarely, but should be squarely, addressed and settled by this Court.

In any event, the Eleventh Circuit Court of Appeals decision conflicts with the individualized case-by-case approach to ADA cases mandated by this Court in *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed. 2nd 307 (1987).

The trial judge, Senior U.S. District Judge, Neal P. McCurn, in denying Green's motion for JMOL, distinguished *Duckett v. Dunlop Tire Corp.*, 120 F.3d. 1222 (11th Cir. 1997) from the unique facts of the Wood case. Memorandum-Decision and Order. *See* Appendix, p. 9A. Judge McCurn found that Green's argument that Wood asked for an unreasonable accommodation in the form of indefinite leave ignored the unique history of the parties and the nature of Wood's disability. *Id.* Judge McCurn found that due to the nature of cluster headaches, Wood admittedly

could not give a date certain when he would be able to return to work. *Id.* However, Judge McCurn found the outer limits of Wood's absences could reasonably be approximated due to Wood's 14-year experience with cluster headaches. *Id.* Judge McCurn found that Wood's request for a reasonable accommodation in December, 1999 was *not* for indefinite discretionary leave, rather it was circumscribed by past experience and that past experience indicated that Wood would be able to return to work within a month or two. *Id.* Therefore, Judge McCurn found that Wood's requested accommodation for discretionary leave was not unreasonable as a matter of law in this unusual circumstance and not inconsistent with *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997). *Id.* at 10-11.

The Eleventh Circuit disagreed with Judge McCurn and his reading of *Duckett* and held that Wood's requested accommodation was not reasonable as a matter of law because he could not state the exact day he would return to work (although Green never asked him to state when he would return).

The Question of Whether an Accommodation Is Reasonable Is a Fact Question for the Jury

The second element in an ADA claim is whether the claimant is able to perform the essential functions of his job, with or without a reasonable accommodation. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11 Cir. 2001). Given the unique nature of Wood's job, a reasonable jury could find that his request for a leave of absence was a reasonable accommodation. The question of whether Wood was able to perform the essential functions of his job with the requested accommodation is a jury question. *Cehrs v. Northeast Ohio Alzheimers Research Center*, 155 F.3d 775 (6th Cir. 1998) (genuine issue of fact as to whether granting further medical

leave to an employee would have constituted a reasonable accommodation under the ADA and precludes a summary judgment). *Cehrs* states that the employee's initial burden of articulating a reasonable accommodation need not be onerous. *Id.* at 781. For the purposes of a prima facie showing, the plaintiff must merely "suggest the existence of a plausible accommodation, the costs of which, facially, do not exceed its benefits." *Id.* In *Cehrs*, the plaintiff had psoriasis and experienced episodic temporary flare-ups necessitating absence from work. *Id.* at 777. *Cehrs* states that a presumption that uninterrupted attendance is an essential job requirement improperly dispenses with the burden shifting analysis set forth in *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996). The burden shifting analysis of *McDonnell Douglas* is applied in ADA cases. *Wascura v. City of South Miami*, 257 F.3d 1238, 1241 (11th Cir. 2001). *Cehrs* stated that under such a presumption that uninterrupted attendance is an essential job requirement, the employer never bears the burden of proving that the accommodation proposed by the employee is unreasonable and imposes an undue burden upon it, *citing Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989) (plaintiff suffered cluster headaches in *Kimbro*). The Eleventh Circuit erred by never getting to the burden shifting analysis adopted by this Court in *Wascura* for ADA cases and erred by ruling as a matter of law on a fact question which should be decided by the jury or argued herein.

Additionally, the Eleventh Circuit interpreted Wood's request as a request for an "indefinite" leave, thereby disregarding the historical pattern of Wood's cluster headaches with the Clerk's office. Holding that Wood's request was for an indefinite leave of absence and ignoring the historical pattern of prior leaves violates the

individualized attention required for ADA cases as directed by this Court in *School Bd. of Nassau County v. Arline*, 480 US 273, 287, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987). In *Arline*, a school teacher was fired from her job because of her susceptibility to TB and brought an action alleging that her dismissal violated the Rehabilitation Act.[3] The U.S. District Judge for the Middle District of Florida entered judgment for the school board employer and the teacher appealed. The Eleventh Circuit reversed and remanded. Certiorari was granted by the this Court. This Court held that the school teacher was a handicapped individual within the meaning of the Rehabilitation Act and the case was remanded to determine whether Arline was otherwise qualified for the job with the instruction that *the district court must conduct an individualized inquiry and to make appropriate findings of fact. Such an inquiry was found by this Court to be essential if the court is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes or unfounded fear.* In the case at bar, the Eleventh Circuit ignored the findings of the jury and the trial judge which did give individualized inquiry to the unique facts of the case. The Eleventh Circuit ignored, and apparently determined irrelevant, that Wood's previous and current leave of absence had caused no undue hardship on the employer. It is impossible to examine a reasonable accommodation under the individualized inquiry required by this Court by failing to consider the effect of the accommodation on the employer. The Eleventh District

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[3]Decisions construing the Rehabilitation Act have been held appropriate for construing ADA cases. *Dockery v. Northshore Medical Center*, 909 F.Supp. 1550 (S.D.Fla. 1995).

never reached the issue that Wood's absences imposed no undue hardship on Green because it held that since he couldn't state the exact day he would return, his request was for indefinite leave and unreasonable as a matter of law.

The Code of Federal Regulations to implement the Americans With Disabilities Act provides that *permitting the use of unpaid leave for necessary treatment is a specific accommodation that may be appropriate for particular situations.* 29 CFR Pt. §1630.2(o). In *Dockery v. North Shore Medical Center,* 909 F.Supp. 1550 (S.D. Fla. 1995), the trial court noted that neither the ADA nor the Regulations provide any guidance as to how long the additional unpaid leave must be and that the reasonableness of this interpretation is *generally a question of fact* which normally precludes the granting of a summary judgment. In *Dockery*, the court did find that a request for a leave of absence of one year was, on its face, unreasonable. In the case at bar, the leave would have been less than two months.[4]

The Eleventh Circuit erroneously applied its prior decision in *Duckett v. Dunlop Tire Corp.,*120 F.3d 1222 (11th Cir. 1997) and held that indefinite leaves of absence are unreasonable on their face, without considering other relevant evidence and also erred by finding that Wood's request was for indefinite leave. In *Duckett*, the Eleventh Circuit noted that the employee's need for leave was for an indefinite period — not just a month or two. In the case at bar, past experience dictated that the leave requested by Wood would have been a month or two. Additionally,

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[4]Wood's doctor advised Green on 2-15-00 that Wood had had no significant headache since the third week in January, 2000, and asked the Clerk to reconsider the termination. P/Exh. 84.

Wood was not asked, nor was his doctor asked, on December 6, 1999 to estimate the period of the leave. Neither Wood nor his doctor was given the opportunity to state that the leave would probably be for a month or two. The Eleventh Circuit stated in *Duckett* that the plaintiff could not represent that he *likely* would have been able to return in a month or two. (emphasis added.) Wood and his physician were never asked when Wood would return to work. Wood's physician told Green on 2-15-00 that Wood had had no headaches since the third week in January, 2000, and asked the Clerk to reconsider Wood's termination. *See* n.4. herein., if they had been asked, would have been able to state that it was *likely* that he would have been able to return to work in a month or two. Green never asked for a time limit and gave every reason for Wood not to expect that he had to provide a time limit because he was given an open-ended leave of absence on 12-3-99 and told not to worry about his job. *The Clerk waived any definiteness in the duration of the leave. Duckett* adopts another court's statement that a "reasonable accommodation is by its terms most logically construed as that which, presently, *or in the immediate future*, enables the employee to perform the essential functions of the job in question." (emphasis added), *citing Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995). A month or two is the immediate future.

The Eleventh Circuit in this action overlooked the fact that this case went to trial on one leave of absence — a leave requested on 12-6-99, not as future speculative leaves. The Eleventh Circuit speculated that Wood *could* be stricken with another cluster headache soon after his return and require another indefinite leave of absence. There was no evidence at trial on the subject of future leaves of absences. Furthermore, such speculation violates the law of other

circuits which have considered the issue by granting certiorari. In *Humphrey v. Memorial Hospital Association,* 239 F.3d 1129 (9th Cir. 2001), the court held that the ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation. All that has to be shown is that the leave of absence could *plausibly* enable the claimant to adequately perform the job.

Garcia Ayala v. Lederle Parenterals, 212 F.3d 638 (1st Cir. 2000) stated that some employees, by the nature of their disability, are unable to make an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite and that each case must be scrutinized on its own and that *an unvarying requirement for definiteness departs from the need for the individualized factual evaluation as required by this Court* in *Arline, supra.* In *Harper v. Honda of America Mfg., Inc., 1998 W.L. 1788072 (S.D. Ohio),* the court held that whether one was qualified and had requested a reasonable accommodation must be examined in light of possible reasonable accommodations and that it may be that an employer is able to grant an employee a leave of several years without pay without incurring significant costs.

In summary, the Eleventh Circuit's analysis of this case eliminates any disabled person with episodic incapacity who cannot state the exact day he or she will return to work from the protection of the ADA. This was not the intent of Congress in enacting the ADA. An individualized inquiry as to each job is required. The jury performed its task in the case at bar. The Eleventh Circuit ignores that individualized inquiry and applies a stereotyped presumption that a leave of absence for a person with cluster headaches is unreasonable because he cannot state a day certain he will return. The

Eleventh Circuit ignores that the leaves of absences had not caused undue hardship to Green. This was because the job was especially created to tolerate Wood's absences. This case was analyzed by the jury and the trial judge on Wood's specially created job. That is the individualized inquiry that is required.

Every other federal court that has dealt with cluster headaches has determined that leaves of absence to resolve cluster headaches are reasonable, i.e., *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989), *Dutton v. Johnson County Board of County Commissioners,* 859 F.Supp. 498 (D. Kan. 1994) and *Carlson v. Inacom Corp.*, 885 F.Supp. 1314 (D. Nev. 1995). The facts of the prior Eleventh circuit decision in *Duckett* are distinguishable — the facts in the Wood case are unique, were found by the jury and trial judge to be unique and the requested accommodation was determined to be reasonable. Whether the accommodation is reasonable is a fact question and the panel erred when it took that determination from the jury. The Eleventh Circuit eliminates all disabled persons who cannot state the exact day they will return to work from the protection of the ADA. This is not what Congress intended. The Eleventh Circuit is out of step with the First, Sixth and Ninth Circuits and with this Court's mandate in *Arline*.

CONCLUSION

This case presents an important question and justice requires that this Court specifically address the issue by granting certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MARK WOOD,
Plaintiff,
v. 2:00-CV-546-FTM-29D
CHARLIE GREEN, CLERK
OF THE CIRCUIT COURT
FOR LEE COUNTY, FLORIDA,
Defendant.

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MEMORANDUM-DECISION AND ORDER

McCURN, Senior Judge:[1]

[1]Senior United States District Court Judge for the Northern District of New York, sitting by designation.

Plaintiff, Mark Wood commenced this action on December 8, 2000, against his former employer Charlie Green, Clerk of the Circuit Court for Lee County, Florida, alleging violations of the Americans With Disabilities Act, 42 U.S.C. §§ 12101 et seq., ("ADA") and the Family Medical Leave Act, 29 U.S.C. §§ 2601 et seq., ("FMLA"), among other things. on February 14, 2002, following an eight-day jury trial, a verdict was returned in favor of plaintiff on the ADA discrimination claim and in favor of the defendant on the FMLA claim. On the ADA claim, the jury awarded Wood back pay damages in the amount of $109,033 but declined to award him any amount for physical or emotional damages. The Court subsequently granted Wood's motion for reinstatement but stayed such order pending appeal. On February 27, 2002, judgment was entered accordingly.

Defendant now moves pursuant to Fed. R. Civ. P. 50(b) for judgment as a matter of law. For the following reasons, the motion is denied.

BACKGROUND

Wood began his employment with the Clerk's Office in 1974. In 1978, Wood began suffering from cluster headaches. By 1985, Wood's cluster headaches increased in severity, causing him to miss lengthening periods of work and preventing him from accomplishing a substantial portion of his duties as a supervisor in the civil section of the circuit and County courts. As a result, the Clerk's Office eventually created a new position for Wood -- Court's Coordinator. Wood's new position required him, among other things, to review new legislation and Florida Supreme Court Rules that affected the courts and to establish procedures accordingly.

Although Wood's cluster headaches subsided for a period of time, they returned worse than ever. In 1995, Wood missed a total of seven weeks of work. Wood's condition

continued to cause him to miss significant amounts of work, in both in 1996 and 1997, and in 1998 Wood missed a total of approximately 15 weeks of work due to his cluster headaches. Throughout the above period of time, Defendant Green routinely granted Wood discretionary leave when he had exhausted his medical, sick and vacation time.

In 1999, cluster headaches caused Wood to miss considerable portions of work in January, February, March, July and August. In the Fall of 1999, Wood met with his direct. supervisor, Ed Flannery, for his annual evaluation. During that meeting, Flannery informed Wood he would not receive the customary annual pay increase due to his attendance record. Flannery also indicated to Wood that he may have to submit weekly doctor's notes if Wood missed additional work.

Shortly thereafter, Wood began experiencing another cluster headache. Because he had exhausted all of his sick, vacation and medical leave Wood requested, by letter dated December 6, 1999, that Green grant him a discretionary leave of absence without pay until he could return to work. Wood's letter also indicated that his doctor was sending a letter confirming that he was treating Wood as a patient.

Wood subsequently telephoned Green to check in and inform him that he was still suffering from a cluster headache. Wood testified that Green told him not to worry about his job and to take care of himself. Additionally, Green told Wood to get him a doctor's letter as soon as he could.

Wood's doctor eventually sent the requested letter to Green in late December 1999. Wood remained out of work. On January 5, 2000, Green terminated Wood.

DISCUSSION

Green renews his motion for judgment as a matter of law challenging the jury's finding that he discriminated against Wood in violation of the ADA by terminating his employment. Specifically, Green argues that Wood was not a qualified individual within the meaning of the ADA because the accommodation he requested was not reasonable, and because Wood could not perform the essential functions of his job as Courts Coordinator even with the accommodation. Further, Green argues that Wood failed to adduce any evidence showing that he was subjected to discrimination because of his disability.

Wood argues that a reasonable jury could find that he was qualified within the meaning of the ADA given the unique nature of his job as Courts Coordinator. Wood also asserts that sufficient evidence exists to support the jury's finding that Green discriminated against him because of his disability.

Green's renewed motion for judgment as a matter of law is governed by Fed. R. Civ. P. 50(b) which states in relevant part that "[i]f, for any reason, the court does not grant a motion for a judgment as a matter of law at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment . . . ." Fed. R. Civ. P. 50(b). In considering a Rule 50(b) motion the court may not make credibility determinations or reweigh the evidence, and must disregard all evidence favorable to the moving party that the jury is not required to believe. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 151, 120 S. Ct. 2097 (2000). The court must view all of the evidence adduced at trial, drawing all reasonable

inferences in the light most favorable to the nonmoving party, see Montgomery v. Noga, 168 F.3d 1282, 1289 (11th Cir. 1999), and the motion should only be granted "where reasonable jurors could not arrive at a contrary verdict." Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1344-45 (11th Cir. 2000).

1. Whether Wood was a Qualified Individual under the ADA.

The ADA mandates that covered employees shall not "discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."42 U.S.C. §12112(a). "In order to establish a prima facie case of discrimination under the ADA, the plaintiff must show that: (1) he is disabled; (2) he was a qualified individual at the relevant time, meaning he could perform the essential functions of the job in question with or without reasonable accommodations; and (3) he was discriminated against because of his disability." Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001) (citing Reed v. Heil Co., 206 P.3d 1055, 1061 (11th Cir. 2000)).

A. Leave of Absence as a Reasonable Accommodation.

Green argues that Wood is not a qualified individual within the meaning of the ADA because he requested an indefinite leave of absence as an accommodation. Relying on Duckett v. Dunlop Tire Corp., 120 F.3d 1222 (11th Cir. 1997) (per curiam) , Green maintains that a request for an indefinite leave of absence is an unreasonable accommodation as a matter of law.

In Duckett, the plaintiff worked for the defendant company as a Section Manager and supervised twelve to

thirteen bargaining unit employees. 120 F.3d at 1223. Shortly after achieving his supervisory position, the plaintiff was hospitalized for high blood pressure. See id. at 1224. Subsequently, the defendant placed the plaintiff on its Salary Continuation Program, which provided the plaintiff maximum benefits for a period of up to 24 weeks, and Lesser benefits for a period of up to 28 weeks.

Eventually, the plaintiff's maximum benefits expired and he began receiving the minimum benefits under the plan. The defendant then submitted a long-term disability application with its insurer on the plaintiff's behalf. After receiving a copy of the plaintiff Is disability application, the defendant requested the plaintiff be examined by various doctors. Shortly thereafter, the defendant's personnel manager informed the plaintiff that it had two medical opinions indicating that the plaintiff could return to his job as a Section Manager, and that the position was available. The plaintiff refused, stating that his doctor had not cleared him to return to work. The defendant then terminated his employment.

The plaintiff sued the defendant under the ADA, arguing that he was "otherwise qualified' to work for [d]efendant in a non-supervisory position, and,[d]efendant was required to accommodate him by either transferring him to such a position or allowing him to remain on medical leave under [d]efendant's Salary Continuation Plan." Id. at 1224.

After agreeing with the District Court that transferring the plaintiff would not have been a reasonable accommodation, the Eleventh Circuit also rejected the plaintiff's argument that, as a reasonable accommodation, the defendant was required to allow the plaintiff to exhaust his remaining two months under the Salary Continuation Program. See id. at 1225. Citing Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1994), the Duckett Court held that just because the defendant

created the Salary Continuation Program as a matter of business policy, it was not required to allow the plaintiff to receive benefits under the plan for an entire year as a reasonable accommodation under the ADA. See id. The Court noted that the plaintiff's "need for leave would have been for an indefinite period -- not just a month or two. Put differently, [p]laintiff could not represent that he likely would have been able to work within a month or two . . . and had no way of knowing when his doctor would allow him to return to work in any capacity. Id. at 1226. Quoting from the Myers v. Hose decision, the Court agreed with the Fourth Circuit that an employer did not violate the ADA by "refusing to grant (an employee] a period of time in which to cure his disabilities where the employee sets no temporal limit on the advocated grace period, urging only that he deserves sufficient time to ameliorate his conditions. Id. (citation and internal quotation marks omitted). Again directly quoting from Myers, the Duckett Court continued:

> Significantly, these provisions [42 U.S.C. 12111(8); 45 CFR §1232.3(i)] contain no reference to a person's future ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as to whether an individual "can" (not "will be able to") perform the job with reasonable accommodations. Nothing in the text of the reasonable accommodation provision requires an employer to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which, presently, or in the immediate future, enables the employee to perform the essential functions of the job in question.

Id. (citation omitted).

Although Duckett appears persuasive here at first blush, it is ultimately distinguishable given the unique facts of this case. It is undisputed that Wood suffered a cluster headache in late 1999 and was absent from work for the entire month of December. At that time, Wood had already consumed all of his vacation time, sick leave and Family Medical Leave Act benefits. Wood then requested that Green grant him discretionary leave until he could return to his position as Court's Coordinator - a request that was eventually denied and resulted in his termination.

Green's argument -- that Wood asked for an unreasonable accommodation in the form of indefinite leave -- ignores the unique history of the parties and the nature of Wood's disability. Due to the nature of cluster headaches, Wood admittedly could not give a date certain when he would be able to return to work. However, the outer limits of Wood's absences could reasonably be approximated due to Wood's fourteen-year experience with cluster headaches. For instance, a three-month absence from the Clerk's office was the longest absence ever taken by Wood. And Wood undisputedly returned to work immediately after each cluster headache subsided. Wood's request for a reasonable accommodation in December 1999 was not for indefinite discretionary leave. Rather, it was circumscribed by past experience -- and that past experience indicated that Wood would be able to return to work within a month or two. Accordingly, Wood's requested accommodation for discretionary leave is not unreasonable as a matter of law in this unusual circumstance.

B. Evidence that Wood Could Perform the Essential Functions of His Job With a Reasonable Accommodation.

Green also argues that the jury's finding that a reasonable accommodation would have enabled Wood to perform the

essential functions of his job as Court's Coordinator is against the manifest weight of the evidence. Green asserts that Wood's job as Court's Coordinator encompassed a wide variety of duties, and that Wood premised his "accommodation" upon only one of his job description duties -- to receive and analyze legislation. Additionally, Green contends that Wood's self-evaluations over the years, plus his application for Social Security Disability benefits, described his job duties as encompassing much more than just reviewing and analyzing legislation. Accordingly, Green argues that Wood's mere testimony regarding his essential functions cannot stand in light of this contradictory evidence.

Wood disputes this argument, contending that sufficient evidence exists to support his position that reviewing and analyzing legislation was his essential job function as Court's Coordinator. Wood asserts that other duties contained in his job description were simply marginal.

The ADA generally defines essential functions as the "fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position." 29 C.F.R. §1630.2 (n) (1). See, e.g., Lucas v. W.W. Grainger, Inc., 257 F.3d at 1258-59. Whether a particular job duty is an essential function requires a case-by-case evaluation based on a number of factors, including the employer's judgment as to what functions of a job are essential and the written description of the job. See Davis V. Florida Power & Light Co., 205 F.3d 1301, 1305 (11th Cir. 2001) (citing 42 U.S.C. §12111(8)). other factors include (1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the employee to perform the function, (3) the terms of the collective bargaining agreement, (4) the work experience of past

employees an the job, and (5) the current experience of employees in the job. See 205 F.3d at 1305 (citing 29 C.F.R. § 1630.2(n) (3)).

Here, the job description for the Court's Coordinator position clearly list duties other than reviewing and analyzing legislation. Wood, on the other hand, testified that reviewing and analyzing was his essential job function, and that the other described duties were marginal in nature. Wood also testified he spent 50% of his time reviewing and analyzing legislation, and that he could perform the essential functions of his job if he were granted a leave of absence. In light of the above factors, and considering the testimony in the light most favorable to Wood, sufficient evidence support's the jury's finding here that a reasonable accommodation would have enabled Wood to perform the essential functions of his job as Court's Coordinator.

C. Attendance as an Essential Function of the Job.

Citing Davis v. Florida Power & Light Co., Green also argues that Wood's requested accommodation is unreasonable because attendance was an essential function of his job as Court's Coordinator. While Davis supports the proposition that job presence can be an essential function of a job, see 205 F.3d at 1306, that general proposition can be limited in its application dependent on the job in question. Here, reviewing the testimony in the light most favorable to Wood, a reasonable jury could find that the Court's Coordinator position was created for Wood in recognition that his cluster headaches would continue to result in absences. A reasonable jury could also find that Wood's primary responsibility as Court's Coordinator was to review legislation and Florida Supreme Court rules, and to establish court procedures responsive to those changes. Crediting Wood's testimony that it was not essential that he be present at work everyday to keep pace with the above task, coupled

with his performance evaluations over the years, a reasonable jury could also determine that attendance in this unique case was not an essential element of the Court's Coordinator position.

2. Whether Sufficient Evidence of Discrimination Exists.

Green also argues that Wood failed to adduce any evidence showing that he was discriminated against because of his disability. Green asserts that the only evidence Wood presented with respect to discrimination -- i.e, his testimony stating that he believed he was terminated because he suffered from cluster headaches -- is insufficient to prove the requisite discriminatory intent. in fact, Green argues that the evidence actually proves that he went out of its way to treat Wood favorably rather than discriminate against him, and that Wood was simply terminated because of his excessive absenteeism.

Wood contends that a reasonable jury could find that a substantial or motivating factor for his termination was the cluster headaches. Relying on Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998), Wood maintains that absences cannot be divorced from a person's disability where the disability in fact causes the absenteeism.

Absent direct evidence of discrimination, "a plaintiff may establish a prima facie case of an ADA violation through circumstantial evidence using the familiar burden-shifting analysis employed in Title VII employment discrimination cases." Wascura v. City of South Miami, 257 F.3d 1238, 1242 (11th Cir. 2001) (citation omitted). Under this framework, Wood must first make out a prima facie case of disability discrimination, whereupon the burden of production shifts to Green to articulate a legitimate, nondiscriminatory reason for terminating him. See id. at 1242-43. Once Green articulates his reasons, "the presumption of discrimination is eliminated and the plaintiff

has the opportunity to come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision." Id. at 1243 (citations and internal quotation marks omitted); See, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-12, 113 S. Ct. 2742 (1993). Wood bears the ultimate burden of persuasion throughout. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1069 (1981).

A plaintiff's prima facie case, coupled with adequate evidence that the defendant's asserted justification is false, may be legally sufficient to sustain the jury's verdict. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. at 148, 120 S. Ct. 2097. Here, Wood makes out his prima facie case: (1) the parties do not dispute he is disabled, (2) as discussed above he was a qualified individual, and (3) he introduced circumstantial evidence that he was discriminated against because of his disability.

Green then articulated a legitimate nondiscriminatory reason for the termination -- excessive absenteeism. Additionally, Green stated that he fired Wood because, (1) Wood had not gotten a letter from his doctor to Green substantiating his medical condition, (2) Wood failed to pay $400 for his health insurance for December, and (3) Green did not think that Wood really wanted to keep working at the Clerk's Office. Wood introduced evidence,- however, showing that his doctor did in fact submit a letter before his termination, that arrangements had been made to pay the insurance bill, and that he very much wanted to remain employed with the Clerk's Office.

From these facts, a reasonable jury could reasonably believe that Green's articulated reasons for terminating

Wood were pretextual, and that Wood was discriminated against because of his disability.

CONCLUSION

Thus, after careful consideration of the entire record before the Court, the parties, submissions, -and the applicable law, and for the reasons stated herein, the Court hereby:

ORDERS that defendant Charlie Green's motion for judgment as a matter of law is DENIED.

DONE AND ORDERED in Syracuse, New York this 29th day of April, 2002.

/s/ Neal P. McCurn

NEAL P. MCCURN
SENIOR U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12971

D.C. Docket No. 00-00546 CV-FTM-29DNF

MARK WOOD,

Plaintiff-Appellee,

versus

CHARLIE GREEN, Clerk of Circuit Court for Lee County, Florida,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 13, 2003)

Before DUBINA, HILL and COX, Circuit Judges.

DUBINA, Circuit Judge:

This case involves an appeal from the district court's order denying appellant Charlie Green's ("Green's") motion for judgment as a matter of law. For the reasons that follow, we reverse and render.

I. BACKGROUND

A. Facts

Appellee Mark Wood ("Wood") began working for the Clerk's Office of the Circuit Court for Lee County, Florida, in 1974. In 1978, Wood began suffering from cluster headaches. By 1985, Wood's cluster headaches caused him

to miss lengthy periods of work and prevented him from accomplishing a substantial portion of his duties. To accommodate Wood's extended absences resulting from the cluster headaches, the Clerk's Office created the new position of Court Coordinator for Wood. Wood's primary duty in his new position was to review new legislation and rules that affected the courts and to establish procedures accordingly. This duty occupied approximately 50% of his time. The remaining 50% of his time was spent working with the supervisors of the court, acting as a sounding board, monitoring court related financial accounts, representing the office on boards and committees, speaking at conferences, handling difficult customers, and disseminating information to the public. When Wood was absent, other people had to do his work, sometimes including the review and analysis of new legislation. Notwithstanding his health problems, however, Wood received favorable yearly evaluations.

Throughout the years, Green, who was Clerk of the Circuit Court for Lee County, Florida, routinely granted Wood discretionary leave when he had exhausted his medical, sick, and vacation leave. In 1995, Wood missed a total of seven weeks of work. He missed significant amounts of work in both 1996 and 1997 as well. In 1998, Wood missed a total of approximately 15 weeks of work due to his cluster headaches. In 1999, Wood's cluster headaches caused him to miss considerable portions of work in January, February, March, July, and August. In the fall of 1999, Wood met with his direct supervisor, Ed Flannery ("Flannery"), for his annual evaluation. Flannery informed Wood that he would not receive the customary annual pay increase due to his absences from work. Flannery also told Wood that Wood might have to submit weekly doctor's notes if Wood missed additional work.

Shortly thereafter, Wood began experiencing another cluster headache. He requested a discretionary leave of absence without pay until he could return to work. Green approved this leave effective December 2, 1999, with no termination date. Wood subsequently telephoned Green to check in and tell him that he was still suffering from a cluster headache. Green told him not to worry about his job and to take care of himself. Additionally, Green told Wood to provide him with a doctor's letter as soon as he could. Wood's doctor sent a letter to Green in late December 1999. On January 5, 2000, Green terminated Wood's employment. *B. Procedural History* Wood brought an Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et. seq.*, ("ADA") and a Family Medical Leave Act ("FMLA") action against Green. After an eight-day jury trial, the jury returned a verdict in favor of Wood on his ADA discrimination claim and in favor of Green on the FMLA claim. On the ADA claim, the jury awarded Wood back pay. The district court also ordered reinstatement, but stayed such reinstatement pending appeal. Green filed a motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The district court denied Green's Rule 50(b) motion, finding that Wood's requested accommodation for discretionary leave was not unreasonable because it was not for indefinite leave. Rather, Wood's fourteen-year history with cluster headaches, which indicated that he would be able to return to work in a month or two, circumscribed Wood's request. In considering the testimony in the light most favorable to Wood, the district court also found that sufficient evidence existed to support the jury's finding that a reasonable accommodation would have enabled Wood to perform the essential functions of his job.

Green then perfected this appeal.

II. ISSUES

1. Whether Wood's requested accommodation of indefinite leaves of absence is reasonable.

2. Whether sufficient evidence of discrimination on the basis of Wood's disability existed.

3. Whether the jury's verdict is against the manifest weight of the evidence.

4. Whether attendance is an essential function of Wood's job so that his requested accommodation is unreasonable.

III. STANDARD OF REVIEW

"We review a district court's denial of a motion for judgment as a matter of law *de novo*, applying the same standards as the district court." *Afontgomeiy v. Noga,* 168 F.3d 1282, 1289 (11th Cir. 1999). Under Rule 50, a party is entitled to judgment as a matter of law "if during a trial by jury the opposing party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for the opposing party on that issue." *United States Steel, L.L.C. v. Peco, Inc.*, 261 F.3d 1275, 1288 (11th Cir. 2001) (internal quotations omitted).

IV. ANALYSIS

Indefinite Leave as a Reasonable Accommodation

Green argues that Wood was not a qualified individual within the meaning of the ADA because Wood's requested accommodation of indefinite leaves of absence was not reasonable. We agree.

The ADA provides that employers shall not discriminate against qualified individuals with a disability because of the disability. 42 U.S.C. §12112(a). "In order to establish a prima facie case of discrimination under the ADA, the plaintiff must show that: (1) he is disabled; (2) he was a 'qualified individual' at the relevant time ... ; and (3) he was discriminated against because of his disability." *Lucas v. W. W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir. 200 1). To

be a "qualified individual" under the ADA, a person must be able to perform the essential function's of his or her job with or without a reasonable accommodation. *Id.* Wood argues that, given the unique nature of his job, a reasonable jury could find that he was a qualified individual within the meaning of the ADA because his request for leaves of absence was a reasonable accommodation.

Green relies on *Duckett v. Dunlop Tire Corp., 120* F.3d 1222 (11th Cir. 1997) (per curiam), in arguing that Wood's request for indefinite leaves of absence is an unreasonable accommodation. In *Duckett, we* held that an employer was not required to allow an employee to stay on medical leave under a salary continuation program. 120 F.3d at 1225. The court noted that:

> the employee's need for leave would have been for an indefinite period - not just a month or two. Put differently, [p]laintiff could not represent that he likely would have been able to work within a month or two ... and had no way of knowing when his doctor would allow him to return to work in any capacity.

Id. at 1226. The court further explained that an employer did not violate the ADA by "refusing to grant [an employee] a period of time in which to cure his disabilities where the employee sets no temporal limit on the advocated grace period, urging only that he deserves sufficient time to ameliorate his conditions." *Id.* (citation and internal quotation marks omitted).

> Significantly, these provisions [42 U.S.C. §12111(8); 45 C.F.R. §1232.3(i)] contain no reference to a person's future ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as to whether an individual "can" (not "will be able to") perform the job with reasonable

> accommodations. Nothing in the text of the reasonable accommodation provision requires an employer to wait for an indefinite period for an accommodation to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which, presently, or in the immediate future, enables the employee to perform the essential functions of the job in question.

Id. at 1226 (quoting *Myers v. Hose,* F.3d 278, 283 (4th Cir. 1995)).

In denying Green's Rule 50(b) motion, the district court attempted to distinguish *Duckett.* The district court found that even though, due to the nature of cluster headaches, Wood could not give a date certain when he would be able to return to work, the outer limits of Wood's absences could reasonably be approximated due to his fourteen-year experience with cluster headaches. The district court found that because Wood's longest absence ever was three months and Wood undisputedly returned to work immediately after each cluster headache subsided, his request for a reasonable accommodation was not for indefinite discretionary leave; rather, Wood's past experience circumscribed his request, and that past experience indicated that Wood would be able to return to work within a month or two. Wood urges us on appeal to adopt the district court's reasoning. Wood also argues that *Duckett* actually supports his contention that a leave of absence is a reasonable accommodation because Wood would return to work within a month or two, unlike the plaintiff in *Duckett.*

Wood contends that a leave of absence can be a reasonable accommodation, citing *Garcia-Ayala v. Lederle Partenterals, Inc.,* 212 F.3d 638, 648 (1st Cir. 2000), which explained that:

> [s]ome employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation.

212 F.3d at 648; *see also Kimbro v. Atlantic Richfield* Co., 889 F.2d 869, 878 (9th Cir. 1989) (holding that leaves of absence for cluster headaches were a reasonable accommodation where no evidence existed as to how the leave of absence would impose an undue hardship on the employer). However, in reaching its conclusion, the First Circuit rejected the findings of the district court, which relied on *Myers v. Hose,* 50 F.3d 278 (4th Cir. 1995). *Myers* held that "reasonable accommodation does not require the County to wait indefinitely for Myers' medical conditions to be corrected, especially in light of the uncertainty of cure." 50 F.3d at 283. We adopted the *Myers* rationale in *Duckett. 120* F.3d at 1225-26. In addition, unlike Wood, the plaintiff in *Garcia-Ayala* had requested leave to a specific date. While a leave of absence might be a reasonable accommodation in some cases, Wood was requesting an indefinite leave of absence. Wood might return to work within a month or two, or he could be stricken with another cluster headache soon after his return and require another indefinite leave of absence. Wood was not requesting an accommodation that allowed him to continue work in the present, but rather, in the future - at some indefinite time. The *Duckett* court parenthetically noted that more compelling facts might lead to a different result. *Id.* at 1226 n.2. For example, the ADA might be violated "if an employee was terminated immediately upon becoming disabled without a chance to use his leave to recover." *Id.*

Wood was not terminated immediately upon becoming disabled. He had been granted years of discretionary leave and had been on a discretionary leave for over one month at the time of his termination. While *Duckett* dealt with indefinite leave, the holding of that case is that an accommodation is unreasonable if it does not allow someone to perform his or her job duties in the present or in the immediate future.

Green created Wood's new position to accommodate Wood's absences from work. In addition, Green previously granted Wood indefinite leaves of absence to deal with his cluster headaches. However, prior accommodations do not make an accommodation reasonable. *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1528 (11th Cir. 1997). Furthermore, Wood's absenteeism had been increasing before his termination. Wood was requesting an accommodation of indefinite leaves of absence so that he could work at some uncertain point in the future. Wood's requested accommodation was not reasonable. *See Duckett, 120* F.3d at 1226. The ADA covers people who can perform the essential functions of their jobs presently or in the immediate future. *Id.* As a result, we conclude from the record that Wood was not a qualified individual under the ADA. Therefore, the district court erred in denying Green's motion for judgment as a matter of law. Because of our disposition of the first issue presented in this appeal, we need not reach the remaining issues.

Based on our foregoing discussion, we reverse the district court's order denying Green's motion for judgment as a matter of law and render judgment in favor of Green.

REVERSED and RENDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12971-EE

MARK WOOD,

Plaintiff-Appellee,

versus

CHARLIE GREEN, Clerk of
Circuit Court for Lee County,
Florida,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).
Before DUBINA, HILL and COX, Circuit Judges.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

Supreme Court, U.S.
FILED
OCT 1 2003
OFFICE OF THE CLERK

No. 03-225

In The

Supreme Court of the United States

MARK WOOD,

Petitioner,

v.

CHARLIE GREEN, CLERK OF THE CIRCUIT COURT FOR LEE COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As the body of this brief makes clear, this Court should deny Petitioner Mark Wood's petition for writ of certiorari as to all questions presented in the petition. In addition, and in accordance with Supreme Court Rule 15.2, Respondent Charlie Green, Clerk of the Circuit Court for Lee County, Florida, raises the following objections to the questions presented:

1. The first question presented in the petition does not accurately reflect the Eleventh Circuit's holding on this issue, and the second and third questions are subsumed within the first. If this Court grants the petition as to any or all of these questions, Respondent submits the following as a more accurately phrased question:

> THE ELEVENTH CIRCUIT CORRECTLY HELD THAT, ON THE FACTS OF THIS CASE, NO REASONABLE JURY COULD FIND THAT WOOD WAS A QUALIFIED INDIVIDUAL WITHIN THE MEANING OF THE ADA BECAUSE AN ACCOMMODATION IS UNREASONABLE IF IT DOES NOT ALLOW SOMEONE TO PERFORM HIS OR HER JOB DUTIES IN THE PRESENT OR IN THE IMMEDIATE FUTURE.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Charlie Green, Clerk of the Circuit Court for Lee County, Florida, requests that this Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on March 13, 2003.

STATEMENT OF THE CASE

Charlie Green, Clerk of the Circuit Court for Lee County, Florida cannot accept the "Statement" submitted by Petitioner, Mark Wood, because it contains many facts irrelevant to proper disposition of Wood's petition and incorporates argument in support of Wood's position. Green submits the following, taken verbatim from the Eleventh Circuit's opinion:

A. Facts

Appellee Mark Wood ("Wood") began working for the Clerk's Office of the Circuit Court for Lee County, Florida, in 1974. In 1978, Wood began suffering from cluster headaches. By 1985, Wood's cluster headaches caused him to miss lengthy periods of work and prevented him from accomplishing a substantial portion of his duties. To accommodate Wood's extended absences resulting from the cluster headaches, the Clerk's Office created the new position of Court Coordinator for Wood. Wood's primary duty in his new position was to review new legislation and rules that affected the courts and to establish procedures accordingly. This duty occupied approximately 50% of his time. The remaining 50% of his time was spent working

with the supervisors of the court, acting as a sounding board, monitoring court related financial accounts, representing the office on boards and committees, speaking at conferences, handling difficult customers, and disseminating information to the public. When Wood was absent, other people had to do his work, sometimes including the review and analysis of new legislation. Notwithstanding his health problems, however, Wood received favorable yearly evaluations.

Throughout the years, Green, who was Clerk of the Circuit Court for Lee County, Florida, routinely granted Wood discretionary leave when he had exhausted his medical, sick, and vacation leave. In 1995, Wood missed a total of seven weeks of work. He missed significant amounts of work in both 1996 and 1997 as well. In 1998, Wood missed a total of approximately 15 weeks of work due to his cluster headaches. In 1999, Wood's cluster headaches caused him to miss considerable portions of work in January, February, March, July, and August. In the fall of 1999, Wood met with his direct supervisor, Ed Flannery ("Flannery"), for his annual evaluation. Flannery informed Wood that he would not receive the customary annual pay increase due to his absences from work. Flannery also told Wood that Wood might have to submit weekly doctor's notes if Wood missed additional work.

Shortly thereafter, Wood began experiencing another cluster headache. He requested a discretionary leave of absence without pay until he could return to work. Green approved this leave effective December 2, 1999, with no termination date. Wood subsequently telephoned Green to check in and tell him that he was still suffering from a cluster headache. Green told him not to worry about his job and to take care of himself. Additionally, Green told

Wood to provide him with a doctor's letter as soon as he could. Wood's doctor sent a letter to Green in late December 1999. On January 5, 2000, Green terminated Wood's employment.

B. Procedural History

Wood brought an Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA") and a Family Medical Leave Act ("FMLA") action against Green. After an eight-day jury trial, the jury returned a verdict in favor of Wood on his ADA discrimination claim and in favor of Green on the FMLA claim. On the ADA claim, the jury awarded Wood back pay. The district court also ordered reinstatement, but stayed such reinstatement pending appeal. Green filed a motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The district court denied Green's Rule 50(b) motion, finding that Wood's requested accommodation for discretionary leave was not unreasonable because it was not for indefinite leave. Rather, Wood's fourteen-year history with cluster headaches, which indicated that he would be able to return to work in a month or two, circumscribed Wood's request. In considering the testimony in the light most favorable to Wood, the district court also found that sufficient evidence existed to support the jury's finding that a reasonable accommodation would have enabled Wood to perform the essential functions of his job.

Green then perfected this appeal.

Wood v. Green, 323 F. 3d 1309 (11th Cir. 2003).

As it relates to Wood's petition, the Eleventh Circuit's opinion held that Wood was not a qualified individual

within the meaning of the ADA because an accommodation is unreasonable if it does not allow someone to perform his or her job duties in the present or in the immediate future. *See Id.* at 1314.

REASONS FOR DENYING THE WRIT

A. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT, ON THE FACTS OF THIS CASE, NO REASONABLE JURY COULD FIND THAT WOOD WAS A QUALIFIED INDIVIDUAL WITHIN THE MEANING OF THE ADA BECAUSE AN ACCOMMODATION IS UNREASONABLE IF IT DOES NOT ALLOW SOMEONE TO PERFORM HIS OR HER JOB DUTIES IN THE PRESENT OR IN THE IMMEDIATE FUTURE.

Wood argued he was entitled to recover under the Americans With Disabilities Act, 42 U.S.C. § 12112 (ADA). The ADA provides:

> [n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (1999). A plaintiff advancing a claim of employment discrimination under the ADA must make a prima facie case establishing that:

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(1) he has a disability;

(2) he is a "qualified individual," able to perform the essential functions of the employment position that he holds or seeks with or without reasonable accommodation; and

(3) the defendant unlawfully discriminated against him because of the disability.

See Reed v. Heil Co., 206 F. 3d 1055 (11th Cir. 2000), citing *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F. 3d 1220, 1226 (11th Cir. 1999).

The Eleventh Circuit held that, on the facts of this record, Wood failed to satisfy the second prong. *Wood*, 323 F. 3d at 1312, 1314. To reach this conclusion, the court relied upon its holding in *Duckett v. Dunlop Tire Corp.*, 120 F. 3d 1222 (11th Cir. 1997) (per curiam), in which it held that an employer was not required to allow an employee to stay on medical leave under a salary continuation program. *Wood*, 323 F. 3d at 1313 (citing *Duckett*, 120 F. 3d at 1225). The court specifically referenced *Duckett*'s language that the employee's

> need for leave would have been for an indefinite period – not just a month or two. Put differently, plaintiff could not represent that he likely would have been able to work within a month or two . . . and had no way of knowing when his doctor would allow him to return to work in any capacity.

Wood, 323 F. 3d at 1313 (citing *Duckett*, 120 F. 3d at 1226). The court then noted *Duckett*'s policy analysis that the ADA was intended to help an individual ***perform*** the job with reasonable accommodations:

> Significantly, these provisions [42 U.S.C. § 12111(8); 45 C.F.R. § 1232.3(i)] contain no reference to a person's future ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as to whether an individual "can" (not "will be able to") perform the job with reasonable accommodations. Nothing in the text of the reasonable accommodation provision requires an employer to wait for an indefinite period for an accommodation to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which, presently, or in the immediate future, enables the employee to perform the essential functions of the job in question. *Wood*, 323 F. 3d at 1313 (citing *Duckett*, 120 F. 3d at 1226).
>
> . . .
>
> While *Duckett* dealt with indefinite leave, the holding of that case is that an accommodation is unreasonable if it does not allow someone to perform his or her job duties in the present or in the immediate future.

Wood, 323 F. 3d at 1314 (citing *Duckett*, 120 F. 3d at 1227). Following its *Duckett* logic, the court held that Wood did not prove the accommodation he requested was intended to help him perform his essential job functions:

> While a leave of absence might be a reasonable accommodation in some cases, Wood was requesting an indefinite leave of absence. Wood might return to work within a month or two, or he could be stricken with another cluster headache soon after his return and require another indefinite leave of absence. ***Wood was not requesting an accommodation that allowed***

> ***him to continue work in the present, but rather, in the future – at some indefinite time.***

Wood, 323 F. 3d at 1314 (emphasis added).

Wood has now petitioned this Court to exercise its discretionary jurisdiction to resolve a purported conflict between the Eleventh Circuit's rule of law and that of other circuit courts of appeals. Supreme Court Rule 10 explains that a Petition for Writ of Certiorari will be granted only for compelling reasons, which includes conflicts between the courts of appeals on the same important matter. As will be shown, the Eleventh Circuit's holding is consistent with other circuit courts of appeals.

Wood first argues the Eleventh Circuit's holding conflicts with *Garcia-Ayala v. Lederie Parenterals, Inc.*, 212 F. 3d 638 (1st Cir. 2000). Although the Eleventh Circuit questioned some of the *Garcia-Ayala* analysis, the court eventually distinguished *Garcia-Ayala* because "unlike Wood, the plaintiff in *Garcia-Ayala* had requested leave to a specific date." *Wood*, 323 F. 3d at 1314.

In *Garcia-Ayala*, plaintiff had been stricken with breast cancer and undergone several rounds of surgery and chemotherapy. After her surgery, plaintiff saw a television report on a bone marrow transplant procedure that offered a treatment for her cancer. Plaintiff informed her employer that she needed to undergo this procedure, which was only available at a Chicago hospital. On April 9, 1996, the doctors who were to perform this procedure certified to her employer that plaintiff would be able to return to work on July 30, 1996. Plaintiff was terminated on June 10, 1996. *Garcia-Ayala*, 212 F. 3d at 642. In rejecting the district

court's finding that plaintiff's requested accommodation was unreasonable, the First Circuit stated:

> Similarly, the court viewed Garcia's requested accommodation – additional leave time with a specific date for return – as a request that her job be held open indefinitely. Lederle had argued that since Garcia's doctor could not give absolute assurances that she would be fit to return to work on July 30th, the request was per se for an indefinite leave and so was unreasonable. ***Garcia specified, however, when she would return, and her doctor released her for return several weeks thereafter.***

Id. at 648 (emphasis added). For ***this*** reason, the First Circuit dismissed the district court's finding that the *Garcia-Ayala* plaintiff requested an indefinite leave of absence. At bottom, then, the First Circuit addressed different facts, which required a different legal analysis and resulted in a different rule of law.

Even if the First Circuit had confronted the *Wood* facts, the First and Eleventh Circuits would likely agree on the outcome. In *Garcia-Ayala*, the First Circuit confirmed that certain leaves, indefinite or otherwise, could be an unreasonable accommodation:

> Of course, that a leave is not indefinite does not make it reasonable. Even short leaves may inflict undue hardship in a given employment situation, ***and there may be requested leaves so lengthy or open-ended as to be an unreasonable accommodation in any situation.***

Id. (emphasis added). Indeed, the First Circuit cited *Duckett* with approval. *Id.* at 650 ("Other factors to be considered as to whether requests for leaves of absence are

unreasonable include . . . where an employee gave no indication as to when she might be able to return to work . . . "). Thus, *Garcia-Ayala* did not, as Wood implies, hold that an indefinite leave of absence was, *per se,* a ***reasonable*** accommodation. Nor did the Eleventh Circuit hold in *Wood* that an indefinite leave of absence was, *per se,* an ***unreasonable*** accommodation. Both the Eleventh and First Circuits recognized different facts beget different results. *Compare Wood*, 323 F. 3d at 1314 (citing *Duckett*, 120 F. 3d at 1314) ("more compelling facts might lead to a different result") *with Garcia-Ayala*, 212 F. 3d at 650 ("We add that our analysis, while applicable to these facts, may not be applicable in other cases.").

The factual differences between *Garcia-Ayala* and *Wood* explain the seemingly different outcomes. The First Circuit faced an employee who needed a leave of absence to receive medical treatment to cure her cancer and return her to work on a permanent basis. Wood, conversely, did not suffer from an illness for which he sought medical treatment to return him to work on a permanent basis. Wood's disability resulted in continuous absences. To address Wood's continuous absences, the Clerk provided Wood's first accommodation, a new job with new duties. Even with this accommodation, however, Wood could not perform his essential job functions. So, the Eleventh Circuit focused on whether the second accommodation Wood requested allowed him to work in the present or near future. Wood's second requested accommodation – indefinite leaves of absence whenever and as long as he needed them – was not intended to cure Wood, or to permit him to work.

In effect, Wood requested an accommodation to ***not work*** when and as long as he suffered from a bout of

cluster headaches. As the Eleventh Circuit noted, the ADA speaks in terms of future tense. Wood's requested accommodation would have only allowed him to work some time in the future. Here, the Eleventh Circuit, examining the undisputed facts of this case, found Wood only proved that:

> [he] might return to work within a month or two, or he could be stricken with another cluster headache soon after his return and require another indefinite leave of absence. ***Wood was not requesting an accommodation that allowed him to continue work in the present, but rather, in the future – at some indefinite time.***

Wood, 323 F. 3d at 1314 (emphasis added). Because *Garcia-Ayala* addresses dramatically different facts, the First and Eleventh Circuits' decisions do not conflict.

Likewise, Wood cites other cases that are factually distinguishable. For instance, in *Kimbro v. Atlantic Richfield Co.*, 889 F. 2d 869 (9th Cir. 1989), plaintiff sued under Washington's handicap discrimination law, consequently the Ninth Circuit did not address whether an indefinite leave of absence was a reasonable accommodation under the ADA. Even if applicable, the Ninth Circuit noted:

> ***This is not to say that [the employer] would necessarily have been obligated to grant a second leave if the migraine condition recurred after return from the initial leave.*** Indeed, the fact that an accommodation has been attempted and was unsuccessful is a relevant consideration for the factfinder and may in fact prove dispositive in determining whether failure to permit subsequent leave constituted failure to make a reasonable accommodation.

Id. at 879, n.10. (emphasis added). Here, the Clerk initially accommodated Wood with a new job position. When Wood could not perform his essential job functions with this first accommodation, the Clerk provided Wood with a second accommodation, a leave of absence. In short, multiple leaves of absences had been attempted and were unsuccessful in allowing Wood to perform his essential job functions. Under *Kimbro*'s own analysis, the Eleventh Circuit correctly found these facts dispositive in determining whether failure to permit a subsequent leave constituted failure to make a reasonable accommodation.

Humphrey v. Memorial Hospital Association, 239 F. 3d 1128 (9th Cir. 2001), also fails to support Wood's conflict argument. There, plaintiff suffered from an obsessive-compulsive disorder that caused her to be excessively late or unable to attend work. After her employer terminated her, plaintiff brought suit under the ADA, alleging that her employer failed to provide her with a reasonable accommodation. The evidence showed that her doctor stated in a letter that plaintiff's condition was treatable and that "she may have to take some time off until we can get the symptoms better under control." *Id.* at 1130-1131. The court held that this evidence was sufficient to satisfy the minimal requirement that a leave of absence could plausibly have enabled plaintiff adequately to perform her job and reversed a summary judgment and remanded to the trier-of-fact. *See Id.* at 1140.

Humphrey does not conflict with *Wood*. The *Humphrey* court noted that different facts may lead to a different result:

> Of course, the requirement to grant a leave where there are plausible reasons to believe that it would accommodate the employee's disability

> can not [sic] be repeatedly invoked, thus permitting an unqualified employee to avoid termination by requesting a leave of absence each time he is about to be fired. As we noted in *Kimbro*, ***the fact that a prior leave was granted and was unsuccessful may be a relevant consideration in determining whether additional leave would be a reasonable accommodation.***

Id. at 1136 n.13 (emphasis added). Given this language, if the *Humphrey* court had confronted facts similar to *Wood*, the result would have been likely identical.

Wood cites *Cehrs v. Northeast Ohio Alzheimers Research Center*, 155 F. 3d 775 (6th Cir. 1998), to bolster his conflict argument. In *Cehrs,* the plaintiff's physician had determined and estimated that the plaintiff could return to work on a part-time basis by a date certain:

> [T]he *Cehrs* Court was confronted with a situation where a request for a ***definite*** and relatively short leave was made, accompanied by a reasonable prospect of recovery.

Walsh v. United Parcel Service, 201 F. 3d 718, 726 (6th Cir. 2000) (explaining *Cehrs*). Like the other cases, *Cehrs* does not conflict with *Wood*. *Cehrs* involved an employee who requested leave to a date certain to receive medical treatment that would then enable her to perform her job.

Wood argues the Eleventh Circuit's decision creates additional conflict because the court took the reasonableness issue away from the jury. Yet the Eleventh Circuit did not hold, as a matter of law, that ***any*** request for an indefinite leave of absence was an unreasonable accommodation. As the court noted, in some situations a leave of

absence might be a reasonable accommodation. *See Wood*, 323 F. 3d at 1314. Rather, the Eleventh Circuit implicitly recognized that in some circumstances the reasonableness of an accommodation can be decided as a matter of law. Other circuit courts of appeals are in accord. *Garcia-Ayala*, 212 F. 3d at 650 (awarding judgment as a matter of law); *Walsh*, 201 F. 3d at 726-727 ("We therefore hold that when, as here, an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation."); *Hudson v. MCI Telcoms. Corp.*, 87 F. 3d 1167, 1169 (10th Cir. 1996) (affirming summary judgment because plaintiff "has failed to present evidence from which a reasonable jury could find that the accommodation she urges, unpaid leave of indefinite duration, was reasonable.").

The need for individualized assessment of an ADA case, as required by *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987), does not preclude disposition as a matter of law. The Eleventh Circuit complied with *Arline*, and closely analyzed the individual circumstances of this case. The court noted that the Clerk employed Wood for over 25 years. During that time period, he provided Wood with the first accommodation by creating a new position especially tailored to accommodate Wood's cluster headaches. Even with this accommodation, however, Wood could not perform his essential job functions, so the Clerk provided Wood with years of discretionary leaves of absence. Given these particular facts, the Eleventh Circuit found no reasonable jury could ever find that the Clerk denied Wood a reasonable accommodation.

This conclusion is consistent with the express language and spirit of the ADA. An accommodation as

contemplated by the ADA is a measure that enables the performance of a job by a person who, without the measure, is disabled from performing the job. *See* 42 U.S.C. § 12111(9). It effectively transforms a disabled person into an enabled person for the purposes of the job. *Garcia-Ayala*, 212 F. 3d at 652 (O'Toole, District Judge, dissenting).

To be an accommodation, the requested leave would have to do what an accommodation under the ADA must do – enable the employee to perform the essential functions of his job. *See Id.* For a proposed period of leave to constitute an effective accommodation, it must be instrumental to effect or advance a change in the employee's disabled status with respect to the job, so that the employee is enabled to do it. *See Id.* at 655. A period of leave would meet this criterion if it permitted the employee to receive therapy or treatment that would succeed in removing the obstacle to employment the particular disability posed. *See Id.* "An EEOC interpretive guideline suggests that leave 'for necessary treatment' could be a reasonable accommodation, 29 C.F.R. pt. 1630, app., and the Department of Labor advises that leave might be a reasonable accommodation 'when the disability is of a nature that it is likely to respond to treatment.' 29 C.F.R. pt. 32, app. A(b)." *See Id.*

No reasonable jury could find that Wood's requested leave could legitimately be an accommodation enabling him, more or less contemporaneously, to perform the essential functions of the job. Rather, the requested accommodation countenanced Wood working when he could, and staying at home when he could not. As of December 1999, he was not able to work. "The requested leave would not have changed that. It would not have made [Wood] able to work when he was unable, and when

he was able again, it was unnecessary. In point of fact, it would have had no effect on [Wood's] actual ability to work." *See Id.*

As the dissenting judge noted in *Garcia-Ayala*:

> There is hazard in trying to speak too broadly or too categorically, especially in this area where the varieties of potential accommodations, and the reasons why any given accommodation might or might not be reasonable, are myriad. ***Still, there will be cases in which a court may appropriately take the question away from the trier of fact and decide it as a matter of law.***

Id. at 652-653 (emphasis added). The need for individualized assessment of an ADA case does not preclude a disposition as a matter of law. The Eleventh Circuit recognized as much and its decision does not conflict with any other circuit court of appeals, much less the public policies underpinning the ADA.

CONCLUSION

For the foregoing reasons, Respondent, Charlie Green, Clerk of the Circuit Court for Lee County, Florida, asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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